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CITY OF LAFAYETTE

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

In Re:

PG&E CORPORATION

-and-

PACIFIC GAS AND ELECTRIC COMPANY,

Debtors.

Case No. 19-30088 (DM)

Chapter 11
(Lead Case)
(Jointly Administered)

**OBJECTION BY THE CITY OF
LAFAYETTE TO REJECTION OF
PURPORTED EXECUTORY
CONTRACT**

- ☐ Affects PG&E Corporation
☐ Affects Pacific Gas and Electric Company
☒ Affects both Debtors

[Related Dkt. No. 7037]

*All papers shall be filed in the Lead Case,
No. 19-30088 (DM)*

The City of Lafayette (the “City”) hereby files this Objection to the rejection of that certain letter agreement (the “Letter Agreement”), dated January 23, 2017, between the City and debtor Pacific Gas and Electric Company (“Debtor” or “PG&E”), identified as Match ID 1022664; Contract ID: CRPSECLM_00403 on that *Notice of Filing of Plan Supplement in Connection with Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization Dated March 16, 2020* [Doc. 7037] (the “Notice of Rejection”), and respectfully states as follows:

BACKGROUND FACTS

1. On March 16, 2020, Debtors filed the *Debtors’ and Shareholder Proponents’ Joint Chapter 11 Plan of Reorganization, Dated March 16, 2020* [Doc. 6320] (together with all schedules and exhibits thereto, and as may be modified, amended, or supplemented, the “Plan”).

2. In accordance with the Plan, on May 1, 2020, the Debtors filed the Notice of Rejection, identifying the Letter Agreement as one of the few contracts and leases that the Debtor sought to reject through the Plan.

3. On May 13, 2020, counsel for the City followed the recommendation set forth in the Notice of Rejection, “**The Debtors encourage counterparties to contact their counsel listed in paragraph 7(g) above prior to filing any Objection,**” and contacted Debtor’s counsel prior to filing this Objection. At this time, the City and the Debtor have been unable to resolve their disputes with respect to the Notice of Rejection.

4. The Letter Agreement pertains to PG&E’s proposed removal and trimming of trees within the City as part of the PG&E project, Community Pipeline Safety Initiative (CPSI) for natural gas pipelines. For the CPSI, the City and PG&E executed the Letter Agreement, wherein PG&E agreed to voluntarily comply with the City’s tree ordinance.

5. The City’s position is that (i) the Letter Agreement is not executory, as only PG&E has material obligations under the agreement; and (ii) the letter agreement cannot be rejected because PG&E may not use rejection as an excuse to violate the City’s tree ordinance.

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OBJECTION TO REJECTION

A. The Letter Agreement Cannot Be Rejected Because it is Non-Executory

6. Section 365(a) of the Bankruptcy Code provides that “the trustee [or debtor in possession], subject to the court’s approval, may assume or reject any executory contract or unexpired lease of the debtor.” 11 U.S.C. § 365(a).

7. Here, the Letter Agreement, in addition to the City’s ordinances and regulations, imposes continuing, material obligations on PG&E, but not the reverse.

8. The Ninth Circuit has adopted the so-called “Countryman” definition of “executory contract” (not defined by the Code): An executory contract is one “on which performance remains due to some extent on both sides.” In other words, a contract is executory “if the obligations of both parties are so unperformed that the failure of either party to complete performance would constitute a material breach and thus excuse the performance of the other.” *See e.g. In re Robert L. Helms Const. & Develop. Co., Inc.* (9th Cir. 1998) 139 F3d 702, 705 & fn. 7 (en banc) (internal quotes omitted).

9. The Letter Agreement is non-executory as it only imposes material obligations upon PG&E. Pursuant to the Agreement, PG&E is obligated to comply with the City’s Tree Protection Regulations. Although the City would have the corresponding duty to process PG&E’s applications after their submission, bankruptcy courts have held that merely ministerial obligations do not transform an otherwise non-executory contract into an executory contract. *See e.g. In re Fed.-Mogul Glob. Inc.*, 385 B.R. 560, 575 (Bankr. D. Del. 2008).

B. Debtors Cannot Use Rejection to Violate City Ordinances

10. Regardless of the Letter Agreement, it is the City’s position that PG&E remains obligated to comply with the City’s tree removal ordinance. It should go without saying that debtors cannot use to rejection to allow them to break the law. But that is exactly what PG&E is attempting to do by the rejection of the Letter Agreement.

11. Any non-compliance by PG&E of the tree removal ordinance could warrant the City pursuing mandatory enforcement through the state courts, as well as the imposition of criminal, civil, and administrative fines and penalties.

12. In any event, if the Court does allow the Debtor to reject the Letter Agreement, the City's rejection damages are not quantifiable by any dollar value. The result of the City's rejection of the Letter Agreement could lead to expensive and protracted litigation against PG&E for violation of its tree removal ordinance. No money damages can be placed on such a waste of City resources.

WHEREFORE, the City prays that the Court enter an order denying the rejection of the Letter Agreement.

Dated: May 15, 2020

BEST BEST & KRIEGER LLP

By: /s/ Caroline R. Djang
CAROLINE R. DJANG
MALATHY SUBRAMANIAN
Attorneys for Creditor
CITY OF LAFAYETTE

PROOF OF SERVICE OF DOCUMENT

I am over the age of 18 and not a party to this bankruptcy case or adversary proceeding. My business address is:
300 South Grand Avenue, 25th Floor, Los Angeles, CA 90071.

A true and correct copy of the foregoing document entitled (*specify*): **OBJECTION BY THE CITY OF LAFAYETTE TO REJECTION OF PURPORTED EXECUTORY CONTRACT** will be served or was served (a) on the judge in chambers in the form and manner required by LBR 5005-2(d); and (b) in the manner stated below:

1. TO BE SERVED BY THE COURT VIA NOTICE OF ELECTRONIC FILING (NEF): Pursuant to controlling General Orders and LBR, the foregoing document will be served by the court via NEF and hyperlink to the document. On (*date*) May 15, 2020, I checked the CM/ECF docket for this bankruptcy case or adversary proceeding and determined that the following persons are on the Electronic Mail Notice List to receive NEF transmission at the email addresses stated below:

☒ Service information continued on attached page

2. SERVED BY UNITED STATES MAIL:

On (*date*) May 15, 2020, I served the following persons and/or entities at the last known addresses in this bankruptcy case or adversary proceeding by placing a true and correct copy thereof in a sealed envelope in the United States mail, first class, postage prepaid, and addressed as follows. Listing the judge here constitutes a declaration that mailing to the judge will be completed no later than 24 hours after the document is filed.

Hon. Dennis Montali
United State Bankruptcy Court
Northern District of California – San Francisco Division
450 Golden Gate Avenue
Mail Box 36099
San Francisco, CA 94102

☐ Service information continued on attached page

3. SERVED BY PERSONAL DELIVERY, OVERNIGHT MAIL, FACSIMILE TRANSMISSION OR EMAIL (*state method for each person or entity served*): Pursuant to F.R.Civ.P. 5 and/or controlling LBR, on (*date*) _____, I served the following persons and/or entities by personal delivery, overnight mail service, or (for those who consented in writing to such service method), by facsimile transmission and/or email as follows. Listing the judge here constitutes a declaration that personal delivery on, or overnight mail to, the judge will be completed no later than 24 hours after the document is filed.

☐ Service information continued on attached page

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

May 15, 2020
Date

Sansanee M. Wells
Printed Name

/s/ Sansanee M. Wells
Signature

This form is mandatory. It has been approved for use by the United States Bankruptcy Court for the Central District of California.

SERVICE LIST
In Re: PG&E CORPORATION
Chapter 11 Case No. 19-30088 (DM)

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Standard Parties Service List

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